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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner.

—against—

NACIREMA OPERATING CO. INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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WEYERHAEUSER STEAMSHIP COMPANY,
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v.

NACIREMA OPERATING CO. INC.,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Weyerhaeuser Steamship Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on September 11, 1956, petitions for rehearing and for rehearing in banc having been denied on November 5, 1956.

Opinion Below

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit is printed in the appendix hereto (pp. 15-26) and also annexed to the record of the Court below (R. 135) and is reported in 236 F. 2d 848.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 11, 1956 (R. 148; App. 27, 28). Timely petitions for rehearing and for rehearing in banc were filed on September 20, 1956 (R. 149, 161) and were denied on November 5, 1956 (R. 159, 165). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

1. Whether a shipowner is entitled to a jury determination of issues of fact in its claim for indemnity against a stevedore in an action originally brought by a longshoreman employee of the stevedore against the shipowner for personal injuries sustained when he was struck by a board which fell from a shelter constructed at a prior port by the same stevedore for the exclusive benefit of its longshoremen.

2. Whether a shipowner is entitled to indemnity from a stevedore by reason of the stevedore's negligence in maintaining and using, for the sole benefit of the stevedore's longshoremen employees, a shelter built by the stevedore, in a case where a longshoreman recovered damages from the shipowner for personal injuries sustained by reason of the stevedore's maintenance and use of the shelter in a dangerous condition.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Action was originally brought in this case by William Connolly, a resident of Boston, Massachusetts (R. 6) against petitioner, Weyerhaeuser Steamship Company, a Delaware Corporation (R. 7) by reason of personal injuries (fractured skull and subsequent total disability) sustained while he was employed as a longshoreman by respondent, Nacirema Operating Co., Inc., a New York corporation (R. 13) on board petitioner's vessel, the SS F E WEYERHAEUSER at Boston, when a piece of board fell on his head while he was working in a lower hold. Jurisdiction was based upon diversity of citizenship of the parties, the amount in controversy being in excess of $3,000 (R. 7).

Jury trial was claimed by Connolly. (R. 1)

Petitioner filed a third-party complaint against respondent claiming right of indemnity in the event that it should be held liable to Connolly (R. 13-17).

Jury trial was had before Judge McGohey in the Southern District of New York. At the conclusion of the testimony, petitioner moved for a directed verdict in its favor against respondent. Decision on this motion was reserved. The Court then submitted to the jury only the case of Connolly against petitioner, stating that the claim over of petitioner against respondent would be submitted to the jury following their disposition of the case as between the original plaintiff and petitioner (R. 116). The jury returned a verdict in favor of Connolly against petitioner on the first count of the complaint, based on negligence. It returned a verdict in favor of petitioner on the second count of the complaint, based on unseaworthiness. The Court then directed the jury to return a verdict in favor of

respondent against petitioner in the third-party action (R. 134).

Following these verdicts, petitioner moved that the verdict in favor of respondent be set aside and that judgment be entered in favor of petitioner against respondent. Motion was also made in the alternative for a new trial (R. 24-26). The trial court denied all these motions.

Judgment in favor of Connolly against petitioner has been paid and satisfied. An appeal was taken to the Court of Appeals for the Second Circuit involving only petitioner's claim for indemnity from respondent. Judgment in favor of respondent against petitioner was affirmed by a divided court (R. 135-148).

The SS F E WEYERHAEUSER is a Liberty ship, owned and operated by petitioner. She had carried a full cargo of lumber, including a deck load, from the West Coast to New York and then Boston. Discharge of cargo at both New York and Boston was performed by respondent pursuant to a standard form of stevedoring contract. The contract provided that respondent would "faithfully furnish" stevedoring services as required by the shipowner and furnish "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." The whole reach of the vessel's deck, holds and cargo equipment were turned over to and came under the control of the stevedore for cargo operations (R. 77, 78, 98, 113, 114). The deck load and part of the underdeck cargo was discharged at Brooklyn, New York commencing January 25, 1952. The vessel left New York on January 30, 1952 and proceeded to Boston where she arrived on the afternoon of Thursday, January 31.

Discharge of cargo commenced at Boston on the afternoon of January 31st and continued through February 1st, 2nd, 3rd and 4th. The weather at Boston was reasonably good until February 4th, although there was slight

precipitation on Saturday, February 2nd. Winds varied from force 1 to 3 on the Beaufort scale and were recorded in the ship's log on Monday, February 4th, at force 2. There was persistent rain on February 4th from the early morning hours.

Four gangs of longshoremen came on board at eight o'clock Monday morning, February 4th. Plaintiff, a longshoreman, was working at the bottom of No. 1 lower hold. At about ten o'clock in the morning he was struck on the head by a piece of wood, which appeared to be a piece of dunnage four or five feet long, eight inches wide and one inch thick. He was seriously injured.

There were no-eye-witnesses to the accident among the ship's personnel. The accident was reported to the acting second mate, who on the same date noted the following entry in the ship's log:

> "1000 Piece of wood from winch drivers shelter (built by them) #1 Hatch fell into #1 LH hitting longshoreman William J. Connolly on head. Hatch tender Pat Devine. Man sent out of hold on stretcher. No ship's gear involved in any manner." (Defendant's Exhibit "C", R. 97).

There was testimony from a number of the longshoremen, including the two winch drivers assigned to No. 1 hatch, that at the time of the accident no actual handling of lumber with ship's gear was being performed at that hatch. They said that the only possible place from which the piece of lumber could have come was from the top of a temporary shelter (R. 43, 60, 61) which had been erected over the winches solely for the winch drivers' own convenience and to protect them from the weather (R. 36, 37, 66, 70, 74, 99, 195). They testified that this shelter was made of scrap lumber, nailed together, with a tarpaulin nailed over the top of it.

The longshoremen, insisted that although it was extremely unusual, some of them said unknown, for a ship to come into a port with such a shelter already erected, that, nevertheless, this ship did have four such shelters in place when it arrived at Boston four days prior to the accident. They said that they had done nothing in connection with construction of this particular shelter and that they had not even examined it carefully or at all (R. 56, 67).

There was further testimony that the shelter was not part of the ship's gear, that it had nothing to do with the working of the ship or its gear (R. 105, 114), that such shelters are built solely for the winch drivers' own personal convenience, are built by them and are always erected immediately upon the arrival of a ship, regardless of the weather (R. 70). The testimony was that such shelters are always erected by longshoremen at all ports in this country, including New York (R. 36-37, 70, 74).

There was further testimony that upon leaving port it was customary for a ship's crew to tear down such shelters in the process of clearing up or "squaring away" the deck and making the vessel ready for sea. This is ordinarily done for the safety of the seamen in the performance of their duties of handling the vessel at sea and handling lines while making fast to a pier at the end of a voyage (R. 71-72).

The ship's officers specifically denied that any shelters were in place when the ship arrived at Boston. As to this, the jury was instructed that plaintiff's claim would fail unless the accident occurred as described by plaintiff's witnesses and that if the jury should find that the shelters were not in place when the ship arrived at Boston, verdict should be for the defendant (R. 118).

On the disputed evidence therefore, the jury's verdict has established as a fact for the purpose of this case that the shelter over the winchmen at No 1 hatch had been built prior to the ship's arrival at Boston (See R. 118).

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy, that the shelter was not an appurtenance of the ship (R. 119-120) but that petitioner was negligent in failing to inspect the shelter and to make sure that there was no loose material on it which could fall from it in such a way as to endanger the longshoremen (R. 119).

The majority of the Court of Appeals have found that although there was sufficient evidence that the shelter was built by respondent at New York in a careless manner, the case is to be distinguished from *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.*, 350 US 124, in that it was not foreseeable that respondent's improper performance of its duty as a stevedore at New York would result in an injury to a longshoreman at Boston. Judge Lumbard dissented on the grounds that it did not necessarily follow that the chain of causation was broken by petitioner's failure to tear down the shelter at sea; that in any event respondent had a continuing duty at Boston to use in its work reasonably safe equipment and reasonably safe methods; that a new risk arose when respondent began to use in Boston the negligently constructed shelters; that responsibility for the dangerous condition rested primarily on the stevedore; that insofar as petitioner was liable only for allowing respondent to use an unsafe shelter its negligence was passive and not active, and that such negligence is comparable to the negligence of the shipowner in the *Ryan* case. It is Judge Lumbard's opinion that in any event the District Court should have left the issue of respondent's liability to the jury (R. 142-146, App. 22-26).

REASONS FOR GRANTING THE WRIT

I. The direction of a verdict for the respondent has, in effect, deprived petitioner of its constitutional right to a jury trial.

On the basis of the evidence, the trial judge's charge, and the jury's verdict against the shipowner, it must be assumed that respondent, petitioner's contracting stevedore, erected a shelter over the ship's winch at New York; that this shelter was supplied by the stevedore solely for use in connection with the performance of stevedore work; and that the shelter was unsafe. It must be further assumed that the jury in finding the shipowner negligent, found as a fact that the winch drivers' shelter was not demolished by the ship's crew after leaving New York, that it was on the ship upon her arrival at Boston, and that respondent's longshoremen used this shelter in connection with their stevedoring operations.

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy and that the shelter was not an appurtenance of the ship.

There was, therefore, substantial evidence in support of the following propositions:

a) The instrumentality that caused the accident was constructed by respondent, was used solely for its benefit and was in its exclusive control,

b) Respondent was negligent in using the shelter at Boston without so much as a casual inspection to ascertain its condition,

c) The primary obligation to furnish the longshoremen a safe place to work rested upon their employer, the respondent.

d) Negligence found on the part of petitioner was merely for breach of a "non-delegable duty" and was passive in nature,

e) The active or primary negligence which caused the accident was solely that of respondent.

These issues were matters for the jury. To deny petitioner at least a jury determination as to the nature of the stevedore's negligence and of the issues of causation was an extreme departure from precedent. In *McFall* v. *Compagnie Maritime Belge*, (1952) 304 N. Y. 314, involving a stevedore's obligation to indemnify a shipowner, the New York Court of Appeals said:

> "Where several tort-feasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. * * * Whether negligence is passive or active is, generally speaking, a question of fact for the jury" (p. 328).

See also *Schulz* v. *Pennsylvania R. Co.*, (1956) 350 U. S. 523; and see *Seawright* v. *A. Garcia y Cia, Ltda.* (E. D. Pa. 1956), 138 F. Supp. 881, where it was said at page 884:

> "Without a further jury determination it is impossible to ascertain at this time whether such negligence on the part of the shipowner constituted primary or secondary, active or passive tortious conduct, * * *."

II. The decision of the majority of the Court of Appeals for the Second Circuit, is, we submit, in direct conflict with the decision of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, (1956) 350 U. S. 133, and in any event unduly limits the scope of that decision; it is also in conflict with the decisions of the Court of Appeals for the Ninth Circuit in *American President Lines, Ltd.* v. *Marine Terminals Corp.*, (1956) 234 F. 2d 753, certiorari denied, 352 U. S. 926, and *United States* v. *Rothschild International Stevedoring Co.*, (1950) 183 F. 2d 181.

Petitioner has relied upon the decision of this Court in the *Ryan Stevedoring* case. It is conceded in the majority of opinion of the Court of Appeals in the case at bar that the facts here are "strikingly similar" to the *Ryan Stevedoring* case, and Judge Lumbard in his dissenting opinion agrees that the case at bar is, in fact, governed by the *Ryan Stevedoring* case.

In the majority of the opinion of the Court of Appeals, the *Ryan Stevedoring* case is differentiated on the theory that in performance of the shipowner's stevedoring requirements it was implicit that the stevedoring contractor agreed to indemnify the shipowner only for "foreseeable damages resulting from the contractor's improper performance of these requirement". We submit that the case is not distinguishable on this ground.

In *Ryan Stevedoring* the stevedore in South Carolina negligently loaded rolls of pulp board, so that when the ship arrived at New York and was being unloaded, the stowed rolls fell upon and injured a New York longshoreman employed by the same stevedore. The ship's chief officer was responsible for safe stowage of cargo and for over-all supervision of the loading done by Ryan, but nevertheless the Court of Appeals held the negligence of the ship to be passive, while the negligence of Ryan as stevedore, was

held to be active. The shipowner accordingly was allowed indemnity from the stevedore. This Court affirmed on the basis of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product" (350 U. S. at 133, 134).

In both cases we have the same situation: a negligent act by the stevedore in one port, which created a dangerous condition and directly caused an injury to a longshoreman employee of the same stevedore at a second port, with the shipowner held responsible in the first instance for the acitve negligence of the stevedore.

In the *Ryan Stevedoring* case the contract merely called for the stevedore to perform all stevedoring operations. In the case at bar, respondent, as stevedore, agreed "to faithfully furnish such stevedoring services as may be required", which amounts to the same thing; and respondent further affirmatively agreed to provide foremen and "such other stevedoring supervision as are needed for the proper and efficient conduct of the work" (R. 77).

The active negligence of the stevedore was not merely (a) in building an unsafe structure for its own employees, but more particularly included (b) using it at Boston without so much as a casual inspection to ascertain its condition. The test of foreseeability applied in the majority opinion relates only to the first specification; it is inapplicable to the second specification which involved breach of the primary obligation that rested upon the stevedore to perform its work at Boston (as well as at New York) in a safe manner.

In the case at bar the stevedore built and used the defective shelter, and in so doing breached its contractual warranty of supplying proper supervision and equipment. Moreover, no shipowner's employees were using or intended to use the defective instrumentality. The shelter was not

a part of the ship. The ship was found by the jury to be seaworthy. Since it was not supplied by the shipowner, and was not a part of the ship, *there was no warranty as to its condition by the shipowner to the stevedoring contractor.* Its use by the stevedore's employees at Boston without supervision or inspection by the stevedore foreman or others was, on the contrary, a breach of the stevedore's contractual warranty.

As stated by this Court in the *Ryan Stevedoring* case:

> "the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty, as a defense" (350 U. S. at 134).

The decision of the Court of Appeals for the Second Circuit is also in conflict with decisions of the Court of Appeals for the Ninth Circuit.

In *American President Lines, Ltd.* v. *Marine Terminals Corp.*, (9 Cir., 1956) 234 F. 2d 753, certiorari denied 352 U. S. 926, a longshoreman was injured by a falling hatch beam which had no locking device, as to which the stevedore had received warning. The shipowner, liable to the longshoreman by reason of the defective condition of its own vessel, was nevertheless held entitled to be indemnified by the stevedore.

In *United States* v. *Rothschild International Stevedoring Co.*, (9 Cir., 1950) 183 F. 2d 181, a longshoreman was injured by the operation of a winch which was known by both the shipowner and the stevedore to be faulty. The longshoreman recovered judgment against the shipowner, but the shipowner was held entitled to indemnity from the stevedore because of the active negligence of the stevedoring in continuing to use the faulty winch.

III. The question here involved is of utmost importance.

This Court has considered the problem of shipowners' liabilities to longshoremen and rights to indemnity from stevedores in numerous recent cases; e. g., *Seas Shipping Company* v. *Sieracki* (1946), 328 U. S. 85; *American Stevedores* v. *Porello* (1947), 330 U. S. 446; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.* (1952), 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn*, (1953), 346 U. S. 406, and of course the *Ryan Stevedoring Case* (1956), 350 U. S. 124. These decisions illustrate the importance of the question.

In the 84th Congress hearings were held on a number of proposals further to clarify the question of third-party liability. See: Hearings before a Special Subcommittee for the Committee on Education and Labor, House of Representatives, 84th Cong., 2nd Sess., May 23, 24 and June 11, 1956. The hearings reflect the intense interest in the subject on the part of all segments of the shipping industry and of the Admiralty Bar (pp. 69-73, 108-09). They also reflect the great reliance of those appearing before the Committee on the impartial reasoning of the Judiciary in the cases decided to date.

The conflict and dilemma with which the Bar is now confronted regarding shipowners' rights for indemnity from stevedores should be clarified.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 350—October Term, 1955.

(Argued May 16, 1956 — Decided September 11, 1956.)

Docket No. 23197

WILLIAM CONNOLLY,

—v.—

WEYERHAEUSER STEAMSHIP COMPANY, *et. al.*

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant and Third-Party Plaintiff-Appellant,

—v.—

NACIREMA OPERATING CO., INC.,
Third-Party Defendant Appellee.

Before:

MEDINA, LUMBARD and WATERMAN,
Circuit Judges.

William Connolly, employed by stevedore, Nacirema Operating Co., Inc., sued vessel owner, Weyerhaeuser Steamship Company, for injuries sustained by him while unloading its vessel and received jury verdict in his favor on allegation that steamship company was negligent. Weyerhaeuser Steamship Company, having impleaded

Nacirema Operating Co., Inc. for indemnity, appeals from directed verdict against it by the U. S. District Court for the Southern District of New York, John F. X. McGohey, *Judge*. Affirmed.

DOW & SYMMERS (William G. Symmers, Frederick Fish, of Counsel), New York City, *for Defendant and Third-Party Plaintiff-Appellant.*

GALLI & LOCKER (Oscar A. Thompson, Patrick E. Gibbons, of Counsel), New York City, *for Third-Party Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

William Connolly, a Boston longshoreman employed by Nacirema Operating Co., a New York corporation, was seriously injured aboard the steamship "F. E. Weyerhaeuser" a vessel owned by Weyerhaeuser Steamship Company, a Delaware corporation, when he was struck on the head by a piece of wood while working at the bottom of No. 1 lower hold. Nacirema Operating Co. is an independent contracting stevedore and had contracted with Weyerhaeuser to discharge cargo at the ports of New York and Boston. The S. S. F. E. Weyerhaeuser had carried a full cargo of lumber, including a deck load, from the West Coast to New York. Her deck load and part of her underdeck cargo had been discharged there by Nacirema, and the ship had then proceeded to Boston to discharge the remainder. On the fifth working day after docking in navigable water at Boston this accident happened. The piece of wood that struck Connolly was approximately four feet long, eight inches wide and one inch thick. There was credible evidence that the only possible place from which it could have fallen was the top of a temporary shelter

over the winches at No. 1 hatch, presumably erected by the longshoreman employes of Nacirema solely to protect them against the weather. This particular shelter was about 4 ft. x 6 ft. and some 7 ft. high. It was constructed of scrap lumber nailed together, and a tarpaulin was nailed across the top.

There was testimony from which the jury could reasonably conclude that at the time of the accident there was a loose second tarpaulin on top of the first one, not nailed down but held down by three boards of about the same size, and that one of these fell down the hatch into the hold and caused the injury.

Connolly alleged two causes of action against the shipowner Weyerhaeuser, one claiming the defendant negligent and the other claming the ship unseaworthy. Weyerhaeuser brought a third-party complaint against Nacirema alleging the injury was caused by Nacirema's negligence and that Nacirema's contract with the shipowner entitled it to be indemnified for any damages that Connolly might recover from Weyerhaeuser.

The case was tried to a jury. The trial judge first submitted Connolly's case against Weyerhaeuser with a statement he was reserving submission of the cross-action until reception of the first verdict. The jury returned a verdict in favor of Connolly in the negligence cause of action and in favor of the ship in the unseaworthiness cause of action.[1]

---

1 The trial court's charge on the issue of unseaworthiness appeared to exclude from the jury's consideration the condition of the winchmen's shelter. However, the correctness of the charge on the issue of unseaworthiness was not before us on this appeal. Therefore, we need not resolve the question that perhaps there might have been a conflict between that charge and the holding in the case of *Pettersen* v. *Alaska S.S. Co.* (9 Cir. 1953), 205 Fed. 2d 478, affirmed 1954, 347 U. S. 396, 74 S. Ct. 601 which appears to hold that a shipowner is liable on the ground of unseaworthiness for injuries received by an employee of a stevedoring company where injuries are caused by defective gear (a breaking block), brought on board by the stevedoring company

Thereupon the Court directed a verdict in favor of Nacirema in the third-party action for indemnity. Weyerhaeuser appeals from this directed verdict and from the failure of the trial court to grant its motion for a directed verdict against Nacirema. Connolly is not a party to this appeal. His judgment against the shipowner has been paid and satisfied. The appeal before us relates only to the third-party proceedings.

The undisputed testimony was that shelters similar to the one at No. 1 hatch are routinely erected on the ships' decks by longshoremen at all United States ports upon the arrival of cargo vessels; that they serve no purpose except for the personal convenience of the winch drivers; and that, the cargo having been discharged, the ships' crews tear them down as part of the process of squaring away the deck and making ready for sea again.

There was a sharp conflict in the evidence on a most material point. Fellow longshoremen who worked with Connolly testified that when the S. S. "F. E. Weyerhaeuser" docked at Boston, shelters were already constructed at most of its hatches, including No. 1 hatch, so they did not construct a shelter at No. 1 hatch although they had arrived at shipside prepared to do so. The ship's officers emphatically denied that any shelters were on deck when the vessel docked. There was no testimony tending to show the ship's crew constructed them; and the only fair inference must be that they were erected there by longshoremen at the port of New York, who, like Connolly, were employees of Nacirema. The master stated that it "would be carelessness on the part of myself and the chief mate" if shelters erected in New York had been left on the vessel on its way to Boston, and the chief officer testified that it was his job to see that these shelters were taken down and that he would have been derelict in his duty if any were on the ship upon arrival in Boston.

The Court charged the jury that Connolly could not recover damages from the shipowner if the jury should find that the shelters were not in place when the ship arrived in Boston. The jury verdict in favor of Connolly therefore established that the shelter over the winch drivers at No. 1 hatch was built before the ship arrived at Boston, that a board on top of it fell from it causing the injury, and that the shipowner negligently failed to perform a duty it owed to Connolly under the circumstances.

In this setting the shipowner now claims that Connolly's employer failed to perform a duty owed to the shipowner; that there would have been no injury to Connolly if this duty had been properly performed; and that therefore the stevedore company should indemnify the shipowner the amount of Connolly's judgment.

Even though the shipowner be found not liable for unseaworthiness it may be found liable in a negligence action if it does not provide a reasonably safe place for a business visitor, *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 2 Cir. (1954), 211 F. 2d 277, affirming the district court on this issue, 111 Fed. Supp. 505; *Fodera* v. *Booth American Shipping Corp.*, 2 Cir. (1947), 159 F. 2d 795; *Vanderlinden* v. *Lorentzen*, 2 Cir. (1944), 139 F. 2d 995. This is a duty the shipowner cannot delegate. It was clearly on this doctrine that the shipowner here was held liable.[2]

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2 The court charged the jury, on the issue of the ship's negligence, as follows:

"Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship."

The unsafe condition of the shelter (more specifically the loose board on the top thereof) was the proximate cause of the injury. Assuming a careless erection of the structure by longshoremen in New York the injury did not occur in New York, but in Boston—and in the meantime the structure was there to be seen on the ship's deck, and the ship had exclusive control over it. The ship negligently departed from established practice in not removing it. It was built to last only as needed in New York; and the New York longshoremen had no reason to anticipate that the structure would be standing when the vessel reached Boston and be offered as a shelter to the longshoremen there. If the New York-built structure had been removed, as all rules of good seamanship dictated, the Boston longshoremen would have erected their own shelter. Offering a ready-made shelter to Connolly the ship could not shift its non-delegable responsibility for the unsafe condition thereof onto Connolly's employer.

However, Weyerhaeuser relies upon *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.* (1956), 350 U. S. 124; 76 S. Ct. 232, affirming our decision in *Palazzolo* v. *Pan-Atlantic S. S., Pan-Atlantic S. S.* v. *Ryan Stevedoring Co., supra.* In that case a stevedoring contractor was found liable to reimburse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard where the contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operation and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo. Indemnity was awarded on the theory that there had been a breach by the contractor of its consensual implied obligation to stow cargo in a reasonably safe manner and thus to save the shipowner harmless for failure to do so.

We do not consider the *Ryan Stevedoring* case controlling here. Though some of the facts are strikingly similar, there is a crucial fact here that is just as strikingly dissimilar, a fact that we believe differentiates the two cases and requires different results. In neither case was there an express agreement of indemnity. By written contract Nacirema undertook "to faithfully furnish such stevedoring services as may be required" and to provide "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." In *Ryan* the agreement was to perform all stevedoring operations. In the *Ryan* case Ryan's longshoremen in Georgetown, South Carolina improperly stowed rolls of pulp board weighing about 3200 pounds each in a hatch of a vessel operated by Pan-Atlantic Steamship in coastwise service. When the cargo was discharged at Brooklyn one of these improperly stowed rolls broke loose and injured a Ryan longshoreman there, one Frank Palazzolo. Palazzolo, having sued Pan-Atlantic alleging both negligence and unseaworthiness, recovered judgment on a general jury verdict. This judgment we, in *Palazzolo* v. *Pan-Atlantic, supra*, and then the Supreme Court in affirming us, required Ryan to indemnify.

A majority of the Supreme Court held that in agreeing to perform all of the shipowners' stevedoring requirements the stevedoring contractor agreed to discharge "*foreseeable* damages resulting to the shipowner from the contractor's improper performance of these requirements." (Italics ours.) *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, at ——, 76 S. Ct. 232 at 235, footnote 3, and authorities there cited.

It is precisely this fact of foreseeability that differentiates the cases. In the direct performance of its contractual duty of proper stowage a stevedoring contractor is obviously chargeable with knowledge that improperly stowed cargo capable of rolling, moving, falling or propelling it-

self, might do so when the cargo is discharged, and thereby cause someone injury, which injury is directly traceable without any intervening factors to the original improper stowage. This is the *Ryan* case. But it is not the instant case. Here, a flimsy shelter built on deck for the convenience of longshoremen at one port, which it was negligent for the ship's officers not to have removed before docking at the second port, was permitted to remain in place by the ship's crew and was offered as a safe place to work to a longshoreman at the second port, thereby causing him injury.

This independent failure of duty by the ship could not have been reasonably foreseen by the stevedoring contractor. It was a negligent act of the ship alone not directly traceable to a breach of a duty to properly stow cargo.

The judgment below is affirmed.

LUMBARD, Circuit Judge (dissenting):

In my view this case is governed by *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), affirming *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277 (2 Cir. 1954). Since there was evidence in the record to support a jury finding that it was the active negligence of Nacirema which caused the plaintiff's injury, the direction of a verdict for Nacirema was erroneous.

My colleagues do not deny that the evidence in this case would be sufficient to support a jury finding that the loose boards were placed upon the winch shelter by Nacirema's longshoremen in New York. Nor do I understand them to deny that under the contract between Nacirema and Weyerhaeuser, Nacirema had a duty to perform its loading and unloading operations in a reasonably safe and workman-

like manner and an obligation to indemnify Weyerhaeuser for any injury to it resulting from the negligent conduct of the unloading and loading operations. Indeed this much indisputably follows from the *Ryan* case.

The majority seeks to distinguish the *Ryan* case by arguing that here Weyerhaeuser was guilty of intervening active negligence in failing to tear down the shelter upon leaving New York, and that this negligence by Weyerhaeuser absolves Nacirema of responsibility. The majority seems to employ this argument in two ways. First, it is argued that Nacirema's negligence was not a proximate cause of the injury to Connolly because it was not foreseeable that Weyerhaeuser would fail to remove the shelter before the ship reached Boston. Second, it is argued that even if Nacirema's negligence was a proximate cause of the accident, Weyerhaeuser is barred from recovering indemnity because it was guilty of independent active negligence which contributed to the injury.

Let us assume with the majority, that Weyerhaeuser was guilty of negligence as a matter of law in failing to tear down the shelter. Such negligence is not implicit in the jury's verdict in favor of Connolly since that might well have been based on Weyerhaeuser's failure to detect the negligent construction of the shelter rather than its failure to tear it down upon leaving New York. But all of the testimony in the case indicates that it was the custom to remove such shelters upon leaving port and that it was dangerous to leave them standing when the ship went to sea.

But merely because Weyerhaeuser was guilty of intervening negligence, it does not necessarily follow that the chain of causation was broken between Nacirema's negligence and the injury to the longshoreman. Where a person negligently creates a risk of harm, he is not ordinarily

permitted to escape liability merely because he assumed that someone else would, in the performance of an independent duty, terminate or protect against the risk which he created. Cf. Restatement of Torts §§ 447, 452. But even if we assume that Nacirema was entitled to rely on Weyerhaeuser's tearing down the shelter, and even if we assume that it was unforeseeable that Weyerhaeuser might fail in this duty, it does not follow that Nacirema was guiltless of negligence which caused the injury. Nacirema had a continuing duty to use in its work reasonably safe equipment and reasonably safe methods. When it commenced unloading in Boston its employees presumably discovered and used this structure which had been constructed by its employees in New York. Even if the risk resulting from the negligence in New York had ended, a new risk arose when Nacirema began to use in Boston the negligently constructed shelter. Merely because the shelter had been allowed to stand while the ship traveled from New York to Boston it does not follow that it in some way became a part of the ship so that responsibility for it passed over from the stevedore to the shipowner. It was still a piece of equipment supplied by the stevedore for use in its work, and responsibility for its dangerous condition rested primarily on the stevedore. Therefore I cannot agree that a jury could not have found that Nacirema's negligence was a proximate cause of the accident.

Nor am I convinced that Weyerhaeuser was guilty, as a matter of law, of active negligence such as would bar indemnity. I have assumed that Weyerhaeuser was guilty of negligence in failing to dismantle the shelter upon leaving New York. I am willing to admit also that this negligence was active negligence. It does not follow, however, that this active negligence was a proximate cause of the injury to Connolly.

Weyerhaeuser's duty to tear down the shelter was quite unrelated to the defectiveness of the shelter or to the risk resulting from its dangerous condition. The custom was to tear down all such shelters, defective or not, because it was dangerous to have such structures on a ship at sea. The testimony was that high winds at sea might blow them down causing a risk of injury from flying timbers. If the plaintiff here had been a seaman injured in this manner while on the voyage, I have no doubt that Weyerhaeuser would be liable for its negligence in leaving the shelter standing.

In this case, however, Connolly's injury did not occur at sea and did not result from the risk created by Weyerhaeuser's breach of its duty to tear down the shelter. Suppose, for example, that Weyerhaeuser had removed the shelter upon leaving New York and had handed it over to the stevedore upon arriving in Boston. Weyerhaeuser would not then be guilty of any active negligence, but if the stevedore had continued to use the shelter the accident would still have happened.

It is true that Weyerhaeuser had the additional duty of providing the longshoremen with a safe place to work and that the jury has properly found it liable for a breach of this duty. But insofar as Weyerhaeuser is liable only for allowing Nacirema to use an unsafe shelter, its negligence is passive, not active. Its negligence in this respect is comparable to the negligence of the shipowner in the *Ryan* case. There the owner had a duty to supervise and inspect the loading of the cargo. This duty was nondelegable and the shipowner was held liable for failing to perform it. But the Supreme Court held in the *Ryan* case that this negligence did not bar indemnity from the stevedore which was primarily responsible for the loading. In the same manner Weyerhaeuser's failure to inspect the shelter used

by Nacirema does not bar it from recovering indemnity for injuries resulting from Nacirema's failure to use proper equipment.

The district court should have left the issue of Nacirema's liability to the jury. We should, therefore, reverse and remand for that purpose.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of September one thousand nine hundred and fifty-six.

Present:

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

WILLIAM CONNOLLY,
Plaintiff,

v.

WEYERHAEUSER STEAMSHIP COMPANY,
Defendant-Appellant,

NACIREMA OPERATING CO. INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

WILLIAM CONNOLLY,

v.

WEYERHAUSER STEAMSHIP COMPANY

NACIREMA OPERATING CO.

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JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED SEP. 11, 1956

A. DANIEL FUSARO, CLERK